85-2038

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JIM KISER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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Belk, Howard, Cobb &
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Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in failing to suppress evidence seized pursuant to a warrant obtained with information supplied by an unidentified informant who was not shown to be reliable or to have an adequate basis for his information?

2. Did the trial court err in refusing to require the state to disclose the identity of the confidential informant?

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OPINIONS BELOW

The defendant's motion to suppress evidence seized pursuant to the search warrant and to produce the confidential informant were denied orally on March 25, 1985, in the York County Court of General Sessions (A-10,11). The South Carolina Supreme Court affirmed the defendant's conviction in an opinion filed on April 14, 1986 (A-3).

JURISDICTION

The decision of the South Carolina Supreme Court affirming the defendant's conviction was filed on April 14, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The fourth amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."

The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

The petitioner, Jim Kiser, was indicted for trafficking in marijuana in an amount over 100 pounds but less than 2000 pounds in violation of S.C. Code Ann. § 44-53-370(e)(1)(b). The marijuana was discovered during a search of his home executed pursuant to a warrant based on information supplied by an unidentified confidential informant. The informant had telephoned Officer Ivey of the Gaston County Police Department and stated that he had been in Kiser's home within the

previous twenty-four hours and that a quantity of marijuana could be found there. Officer Ivey in turn called Officer Giles of the York County Sheriff's Department, who drew up an affidavit and procured a search warrant that same day. The search of Kiser's home revealed approximately 700 pounds of marijuana.

Before trial, Kiser made several motions, including motions to suppress the evidence seized in the search, to produce the confidential informant, or in the alternative to require the presiding judge to interview the informant to determine his reliability (A-9). The motions were denied (A-10), and Kiser was tried and convicted. He was sentenced to a term of 25 years imprisonment, without parole, plus a $25,000 fine. On appeal, Kiser raised the issues presented in this petition (A-16), but the South Carolina Supreme Court affirmed his conviction (A-3).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT ESTABLISHED PROBABLE CAUSE, BECAUSE THE UNIDENTIFIED INFORMANT WAS NOT SHOWN TO BE RELIABLE OR TO HAVE AN ADEQUATE BASIS FOR HIS INFORMATION.

The fourth amendment to the United States Constitution guarantees freedom from unreasonable search and seizure, and provides that no warrant shall issue except upon probable cause. One of the primary values of this warrant process is that it permits informed and deliberate determinations of probable cause to be made by a neutral and detached magistrate. Aguilar v. Texas, 378 U.S. 108 (1964). In this Court's decision in Illinois v. Gates, 462 U.S. 213 (1983), it was stated that a magistrate should examine the "totality of the circumstances" in determining whether an affidavit containing information from an unnamed informant constitutes suffi-

cient probable cause for issuance of a warrant. In retreating from the two-pronged test set forth in Aguilar v. Texas, supra, and Spinelli v. United States, 393 U.S. 410 (1969), however, this Court did not sanction the abdication of the magistrate's duty, and in Gates it was emphasized that the reliability of the source of information is crucial in determining probable cause. 462 U.S. at 233. Thus, the elements of the two-pronged test--that the affiant must reveal the "basis of knowledge" of the informant and provide facts sufficient to establish the veracity of the informant or the reliability of the informant's report--are still to be applied as factors in the "totality of the circumstances test. Id. at 230.

An examination of the affidavit at issue in the present case reveals its insufficiency with regard to each of these factors.

The facts related in the affidavit with regard to the informant's "basis of knowledge" are simply that "he has been to this residence in the last twenty four hours and has seen marijuana on the premises" (A-14). These allegations are insufficient in that they do not "describe the accused's activity in sufficient detail [so] that the magistrate may know he is relying on something more substantial than a casual rumor" or "individual general reputation." Spinelli v. United States, supra, 393 U.S. at 416. Specifically, there are no details regarding the amount of contraband the informant saw, where in the residence the contraband was seen, or how the informant came to be at the residence. Additionally, there was no police corroboration of the information.

The unique facts of this case demonstrate the suspect nature of the infor-

mant's basis of knowledge. The contraband was found in a unique setting and in unique packaging. It was kept in a windowless central room in the house, and was stored partially in a child's plastic swimming pool on top of a bed. There was no information given by the informant as to these unique details, which, together with failure to give details regarding how he happened to be in the house, strongly suggests that the informant did not actually observe the marijuana first-hand. See United States v. Button, 653 F.2d 319 (8th Cir. 1981) (affidavit which stated that informant had seen a large quantity of angel dust come from a residence failed to provide sufficient underlying circumstances from which the magistrate could independently determine the "basis of knowledge" of the informant).

Even more damaging to the validity of

the affidavit is the fact that it failed to adequately establish the reliability of the informant. Wholly conclusory statements concerning the credibility of a confidential informant are inadequate for a showing of veracity and will not support a finding of probable cause, Illinois v. Gates, supra, 462 U.S. at 228; in the present case, it was precisely this type of conclusory statement which the magistrate relied upon in issuing the warrant.

The affidavit stated simply that the informant had been known by Officer Ivey "for two years and has proven reliable in similar cases and whose information has led to other arrests in similar cases" (A-15). These statements provide inadequate details as to the informant's credibility, for they indicate nothing regarding what sort of information was provided in the past, how often information

was obtained, or how often the information obtained had proved to be accurate. See United States v. Schmidt, 662 F.2d 498 (8th Cir. 1981) (similar allegations held to be "uninformative and conclusory" and insufficient to establish the reliability of the informant).

The insufficiency of the attempted showing of reliability is made even more clear by the testimony of the police officers involved in the affidavit. Although the affidavit drawn up by Officer Giles stated that the informant had been known to Officer Ivey for two years and had provided information leading to other arrests, Officer Ivey himself testified under oath that he had not made such statements to Officer Giles:

> Q. Now what information did you provide to Detective Giles as to your informant?
>
> A. I only told him that the informant had proven reliable to me in the past.

Q. That the informant had been reliable in the past?

A. Yes.

(A-12) Because Officer Giles testified that he did not know the identity of the informant, had never spoken to the informant, and had received no information regarding the informant from another source (A-13), it is apparent that Officer Giles fabricated the portion of the affidavit supplying the statement that the informant had provided information leading to arrests in the past. Thus, the warrant is invalid under the rule of Franks v. Delaware, 438 U.S. 154 (1978), in which this Court held that deliberate falsehoods or reckless disregard for the truth of statements made by the affiant would invalidate a search made pursuant to a warrant obtained pursuant to the affidavit.

Viewing all of these factors under

the "totality of the circumstances" test of Illinois v. Gates, supra, it is clear that the affidavit was insufficient to establish probable cause for the search warrant. Therefore, the evidence obtained as a result of the search warrant should have been suppressed. Notwithstanding the deference which must be accorded to the magistrate's determination, if the information contained in the affidavit simply does not add up to probable cause, the warrant will be held invalid. United States v. Lambert, 771 F.2d 83, 92-93 (6th Cir.), cert. denied, 106 S. Ct. 598 (1985); United States v. Reivich, 610 F. Supp. 538 (W.D. Mo. 1985).

The good faith exception to the exclusionary rule is not applicable in a case such as this because it cannot be said that the officer who obtained the warrant had reasonable grounds for believing that the

warrant was properly issued. Under United States v. Leon, 104 S. Ct. 3405, 3421 (1984), suppression remains appropriate where the magistrate was misled by information in an affidavit that the affiant knew was false or was provided through reckless disregard for the truth. Moreover, the affidavit in this case was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Id. at 3422.

II. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE STATE TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

It is well established that in appropriate circumstances a state may be constitutionally required to disclose the identity of an informant. Roviaro v. United States, 353 U.S. 53 (1957). Whether disclosure is required depends upon the particular circum-

stances of each case, taking into consideration the crime charged and the possible defenses, the possible relevance and significance of the informant's testimony, and other related factors. Id.; McLawhorn v. North Carolina, 484 F.2d 1 (4th Cir. 1973). Disclosure generally should be compelled where an informant is a "participant" in the criminal activity which is the subject of the trial. Id.

Several unique factors in this case require the disclosure of the informant whose information served as the basis for the issuance of the search warrant leading to the discovery of contraband in petitioner Kiser's home. Under the circumstances of the case, the informant had to be either a "participant" in the crime alleged, or else he could not have personally seen contraband at Kiser's home. In either event, disclosure is re-

quired.

The affidavit underlying the search warrant states that the informant was at Kiser's house "in the last twenty four hours." Kiser contends that if this is accurate then the informant was an individual who purchased drugs at the house, and thus must be characterized as a "participant" under the rule of Roviaro v. United States, supra, and McLawhorn v. North Carolina, supra. Balancing the public interest in protecting the flow of information against the individual's right to prepare his defense, as required by Roviaro, it is clear that the scale tips in favor of revealing the informant's identity. If the informant was a participant, he clearly gave misleading and false information to the police concerning his activities, and thus his credibility is called into question. In addition, the identity of the informant was

relevant to Kiser's defense, which rested largely on challenging the probable cause for the issuance of the search warrant. Without being able to question the informant, Kiser was critically hampered in his ability to challenge the warrant. There is no indication that the public interest in protecting the flow of information would be harmed by disclosing the informant's identity in this case. Thus, if the informant was a participant, his identity must be disclosed.

On the other hand, if the informant was not a participant, there is no way that he could have had the personal knowledge of the marijuana which was claimed in the affidavit for the search warrant. This is no matter of mere conjecture; Kiser was aware of who was at his house over a twenty-four hour period. If the informant did not personally see the marijuana, then the search warrant was based

on unreliable information and the results of the search must be suppressed. See Illinois v. Gates, supra.

An additional factor in this case is the real possibility that the police were aware of misstatements and lies by the informant. In Franks v. Delaware, supra, this Court held that an evidentiary hearing is required where allegations of false statements by an affiant are made. In the present case the police may have been aware that the informant was not present at the house when claimed or was a participant in a drug transaction. In either case, the failure to indicate either of these alternatives in the affidavit would undermine the finding of probable cause for the search warrant. Thus, an evidentiary hearing at which the informant would necessarily be questioned would be necessary to arrive at the truth of the matter. See United States v.

Hurse, 453 F.2d 128 (8th Cir. 1972), cert. denied, 414 U.S. 908 (1973) (where informant's tip was relied upon to procure search warrant, his identity may be disclosed to determine validity of warrant); People v. Dailey, 639 P.2d 1068, 1076 (Colo. 1982) ("where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information"); accord United States v. Swanson, 399 F. Supp. 441 (D. Nev. 1975); State v. Chase, 439 A.2d 526 (Me. 1982); State v. Luciow, 308 Minn. 6, 240 N.W.2d 833 (1976).

In sum, the circumstances all lead to the conclusion that the trial court erred in failing to require the disclosure of the

informant's identity, or, at a minimum, to require an in camera hearing to determine and balance against each other the importance of the informant's testimony to the defendant's case and the strength of the government's interest in maintaining the informant's anonymity.

CONCLUSION

For the foregoing reasons, the petitioner, Jim Kiser, respectfully requests this Court to grant this petition and issue a writ of certiorari to the South Carolina Supreme Court.

Respectfully submitted,

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v

Jim Kiser, Appellant.

Appeal From York County
Robert L. McFadden, Judge

Opinion No. 22529
Submitted December 27, 1985 - Filed April 14, 1986

AFFIRMED

Dale T. Cobb, Jr., of Belk, Howard, Cobb & Chandler, P.A., of Charleston, for appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, Assistant Attorneys General Harold M. Coombs, Jr., and Carolyn M. Adams, all of Columbia; and Solicitor William L. Ferguson, of York, for respondent.

PER CURIAM: Appellant was convicted of

possession of greater than one hundred pounds of marijuana ("trafficking in marijuana") and sentenced to the mandatory minimum sentence of twenty-five years and fined twenty-five thousand dollars. S.C. Code Ann. § 44-53-370(e)(1)(b)(1985). Appellant contends this statute is unconstitutional. We disagree and affirm.

Appellant argues that the mandatory minimum sentence as provided in S.C. Code Ann. § 44-53-370(e)(1)(b)(1985) violates the due process, equal protection, and cruel and unusual punishment clauses of the United States and South Carolina Constitutions. Section 44-53-370(e)(1)(b) provides:

> (e) Any person who knowingly sells, manufactures, delivers, or brings into this State, or who provides financial assistance or otherwise aids, abets, or conspires to sell, manufacture, deliver, or bring into this State, or who is knowingly in actual or constructive possession of:

> (1) Ten pounds of marijuana is guilty of a felony which is known as "trafficking in marijuana" and upon conviction must be punished as follows if the quantity involved is:
>
> * * *
>
> (b) One hundred pounds or more, but less than two thousand pounds, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended, and a fine of twenty-five thousand dollars.

Due Process and Equal Protection

Appellant argues that the statute violates substantive due process and equal protection because the mandatory sentence is not "rationally related to any legitimate state goal." Appellant also contends that § 44-53-370 violates equal protection because it unconstitutionally "singles out those convicted of drug trafficking offenses for mandatory minimum sentences." It is abundantly clear that the State has a vital interest in protecting its citizens from the "grave public

health threat" of large scale marijuana trafficking. "[T]he decision to single out marijuana traffickers for especially harsh penalties has the rational basis of protecting the public health by attacking the most pressing danger with the stiffest penalties." United States v. Richards, 737 F.2d 1307, 1310 (4th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985).

Cruel and Unusual Punishment

The cruel and unusual punishment clause requires that the duration of a sentence not be grossly out of proportion with the severity of the crime. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); State v. Gamble, 249 S.C. 605, 155 S.E.2d 916 (1967), cert. denied, 390 U.S. 927, 88 S.Ct. 862, 198 L.Ed.2d 988 (1968). In reviewing sentences for proportionality, three objective

criteria are considered: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. Solem v. Helm, supra. Having applied the above criteria to § 44-53-370(e)(1)(b), we find that the mandatory minimum punishment is not disproportionate. See State v. Johnson, 276 S.C. 444, 279 S.E.2d 606 (1981).

Appellant's other exceptions are without merit and are affirmed pursuant to Supreme Court Rule 23 and the following authorities: Illinois v. Gates, 42 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); State v. Adams, 279 S.C. 228, 306 S.E.2d 208, cert. denied, 464 U.S. 1025, 104 S.Ct. 558, 78

L.Ed.2d 730 (1983).

AFFIRMED.

_____/s/_____C.J.
_____/s/_____A.J.
_____/s/_____A.J.
_____/s/_____A.J.
_____/s/_____A.J.

Transcript - Record Below at Page 9

We also would move to suppress the fruits of the search that was conducted at Mr. Kiser's residence on July 28th of 1984. My understanding is that there was a search warrant issued and would like to contest the affidavit to the search warrant and the information that lead up to the search warrant being issued and, Your Honor, towards that view I might be sort of sidetracked here from the motion in limine because contemporaneous with that we've also filed a motion to produce the confidential informant and I think that the Court would at some time want to hear, perhaps contemporaneous with the motion to suppress the evidence because they go hand in hand.

Transcript - Record Below at p.54

THE COURT: On the first point, I don't have any doubt that the, and I find as a fact beyond a reasonable doubt, that the warrant was issued in good faith and properly issued and it stands and is not suppressed. Now as to the other matter, I'll look at your cases on those matters and make some determination about that as to whether that confidential informant will have to be provided initially to the Court only. I'll make some determination about that, but that is not necessary at this point.

Transcript - Record Below at p. 58

THE COURT: Let me state for the record, on yesterday I indicated I would take under advisement the Defense motion regarding disclosure or in camera examination of the confidential informant. I am denying all those motions, Mr. Cobb.

Transcript - Record Below at p. 16

Q. Now what information did you provide to Detective Giles as to your informant?

A. I only told him that the informant had proven reliable to me in the past.

Q. That the informant had been reliable in the past?

A. Yes.

Transcript - Record Below at p. 45

Q. And you haven't personally that you know of, you say, talked to the informant?

A. Not to my knowledge.

Q. You don't know the informant's name?

A. No sir, I sure don't.

Q. Does anyone in the York County Sheriff's Department know the informant's name?

A. I don't know.

STATE OF SOUTH CAROLINA

County of York AFFIDAVIT

Personally appeared before me, one Christopher E. Giles who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County.

DESCRIPTION OF PROPERTY SOUGHT

A quantity of illegal drugs, namely marijuana

DESCRIPTION OF PREMISES, PERSON, PLACE OR THINGS TO BE SEARCHED

A frame house, and a greenhouse located at Rt. 3 Box 106, Sandifer Rd. York S.C. The person of Jim Kiser.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Affiant has received information from Gaston

County, North Carolina Police Officer Dody Ivey who has worked with York County Sheriff's Department on other occasions. Officer Ivey received information from a reliable informer who he has known for two years and has proven reliable in similar cases and whose information has led to other arrests in similar cases. The informer states that he has been to this residence in the last twenty four hours and has seen marijuana on the premises. Jimmy Kiser is a suspected drug dealer and has previous arrests for drug violations.

Sworn to and Subscribed before me
this 28 day of July, 1984.

_____/s/_____(L.S.)
Signature of Judge

_____/s/_____
Affiant

Address 529 S. Cherry Rd.
Rock Hill, S.C.
Phone 327-2021

Record Below - p. 149

E X C E P T I O N S

I. Did the trial Judge err in denying Appellant's motion to quash the indictment on the basis that the statute is unconstitutionally vague and broad in violation of the Appellant's constitutional right to due process and equal protection?

II. Did the trial Judge err in denying Appellant's motion to quash the indictment inasmuch as the mandatory sentence provided in the statute violates the Appellant's constitutional rights against cruel and unusual punishment?

III. Did the trial Judge err in denying Appellant's motion to produce the confidential informant in violation of the Appellant's constitutional right to confront and question his accusers?

IV. Did the trial Judge err in denying Appellant's motion for the trial Judge to question the confidential informant en camera to determine the reliability of the informant, and the reliability of the information which formed the basis of the probable cause for the issuance of a search warrant?

V. Did the trial Judge err in prohibiting Appellant's counsel from inquiring on cross-examination as to whether or not the confidential informant was being rewarded in some form or fashion in exchange for the information that had been provided?

VI. Did the trial Judge err in denying Appellant's motion to suppress the evidence found inasmuch as the information provided to the issuing magistrate failed to establish sufficient probable cause for the issuance of such warrant?

VII. Did the trial Judge err in denying Appellant's motion to suppress the evidence on the basis that the information contained in the search warrant was the product of third hand hearsay?